United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-1393

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1393

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

LOUIS E, WOLFSON, ELKIN B. GERBERT,

Defendants,

LOUIS E. WOLFSON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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November 18, 1976

CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. § 1291 from a final order of the United States District Court for the Southern District of New York, Hon. Edmund L. Palmieri presiding, denying without hearing a petition for a writ of error coram nobis, and denying an application for disqualification of Judge Palmieri. The decisions of the district court are unreported.

ISSUES PRESENTED FOR REVIEW

1. Whether, in the light of 28 U.S.C. § 455 (as amended in 1974), and this court's decision in United States v. Simon, 393 F.2d 90 (2d Cir. 1968), the petition should have been assigned to a judge other than Judge Palmieri, in view of the facts that (a) Judge Palmieri had presided over two lengthy and acrimonious criminal trials of defendant and an extensive hearing on defendant's motion for a new trial; and (b) there had been a series of bitter and hostile encounters between the judge and defendant both in and out of course over a period of 10 years.

2. Whether petitioner is entitled to a writ of error coram nobis based upon undisputed proof that, notwithstanding petitioner's request, the prosecutors failed to disclose prior sworn testimony of a key prosecution witness which contradicts his incriminating testimony at petitioner's trial?

3. Whether petitioner is entitled to the writ based upon undisputed proof that his associate trial counsel, without petitioner's knowledge or consent, appeared and testified before the grand jury under compulsion on the day before the indictment came down?

4. Whether petitioner is entitled to a hearing on his claim that during the trial his chief trial counsel was under criminal investigation by the SEC and the Department of Justice, and failed to so inform petitioner, with the result that petitioner's defense was chilled, inhibited, and ineffective?

5. Whether the district court acted properly in denying the petition on the ground that counsel failed to comply with directives of the court, where the judge was not authorized by law to issue the directives, counsel nevertheless substantially complied with them, the court did not warn counsel that sanctions would be imposed for failure to comply fully, and the court did not first employ less drastic sanctions?

STATEMENT OF THE CASE

This appeal brings before the court the culmination of Louis E. Wolfson's ten year quest for justice and an opportunity to establish his innocence before a fair and impar-

tial tribunal. The record contains important newly discovered evidence which has never been presented in any of the prior proceedings involving Wolfson. This evidence establishes specific, serious violations of Wolfson's Fifth and Sixth Amendment rights prior to and during his 1967 trial, and supports Wolfson's contentions that he is innocent and that the conduct of the grand jury proceedings, prosecution and trial was contrary to fundamental law.

PRIOR PROCEEDINGS

On September 19, 1966, Wolfson and Elkin B. Gerbert were indicted by a grand jury in the Southern District of New York in connection with sales during the early 1960s of unregistered common stock of Continental Enterprises, Inc. (hereinafter the "Continental case"). Wolfson was convicted on September 29, 1967, after a 23 day trial. He was sentenced to a year in prison, to pay a fine of $100,000, and to pay the costs of prosecution under 28 U.S.C. § 1918(b). The conviction was affirmed on December 27, 1968 by this court, 405 F.2d 779, and certiorari was denied, 394 U.S. 946.

A motion for a new trial on grounds of newly discovered evidence was made on October 9, 1968, while the appeal was pending. After an extended evidentiary hearing Judge Palmieri denied the motion. 297 F.Supp. 881 (1969).

This court affirmed, 413 F.2d 804 (1969).

Wolfson served his sentence and paid his fine and the costs of prosecution. (App., 10A.)

On October 18, 1966, while the Continental case was before the district court, the same grand jury indicted Wolfson, Gerbert and others on 5 counts of conspiracy to violate and violation of several statutes relating to perjury, obstruction of justice and similar offenses, in connection with transactions relating to sales of stock of Merritt-Chapman and Scott Corporation (hereafter the Merritt-Chapman case). The case was specially assigned to Judge Palmieri for trial.

On April 18, 1968, while the Continental case was sub judice in this court, Wolfson moved Judge Palmieri to disqualify himself in the Merritt-Chapman case on the authority of United States v. Simon, 393 F.2d 90 (2d Cir. 1968), decided the day before. That motion was denied and mandamus was denied by this court for lack of jurisdiction, because no affidavit of bias had been submitted, 394 F.2d 7. The defendants thereupon filed an affidavit of bias and moved Judge Palmieri to disqualify himself under 28 U.S.C. §§ 144 and 455. This motion was also denied, and review by mandamus was refused by this court on May 29, 1968. Wolfson v. Palmieri, 396 F.2d 121.

Wolfson proceeded to trial before Judge Palmieri in the Merritt-Chapman case. After seven weeks of trial he was convicted and, on appeal, his conviction was reversed. 437 F.2d 862 (1970). He was tried twice more before another judge, but neither jury could reach a verdict. Finally, to avoid a fourth trial, Wolfson pleaded nolo contendere and was fined, but not sentenced to jail. (App., 24A.)

On May 16, 1975, Wolfson filed this petition for a writ of error coram nobis as to the Continental conviction. (App., 1A.) He addressed a request to Chief Judge Edelstein that the petition be assigned to any judge other than Judge Palmieri. (App., 4A.) Judge Edelstein denied the request and referred the petition to Judge Palmieri. Thereafter, on June 18, 1975, Wolfson moved under 28 U.S.C. §§ 144 and 455 for disqualification of Judge Palmieri. (App., 146A.) That motion was denied in a memorandum and order dated July 23, 1975. (App., 147A.) A motion for reconsideration was denied by memorandum dated September 16, 1975. (App., 175A.)

On July 26, 1976, the court denied the petition for coram nobis in all respects, having refused all motions for discovery and an evidentiary hearing. (App., 319A.) The

court found the petition legally insufficient and, in addition, based its denial on the alleged failure of Wolfson's counsel to comply with orders of the court. This appeal followed.

FACTS

We divide the facts according to the two major issues presented on this appeal. The threshold issue is whether Judge Palmieri should have disqualified himself; if so, the case must be sent back to another district judge. The facts on this issue include, among others, the facts relating to the asserted failure of counsel to comply with the court's orders.

The second issue is whether the record presented to the court below required the granting of the writ of error coram nobis or, at the very least, a hearing after appropriate discovery.

The following statement is based primarily upon the petition, the exhibits thereto, and the accompanying Memorandum of Law and Fact, all of which were verified by Wolfson insofar as they contained assertions of fact.

A. Facts Relating to Disqualification

Judge Palmieri has had before him a series of proceedings involving Wolfson for almost ten years. During that period, the judge has presided over two long

trials arising from two separate indictments as well as a lengthy evidentiary hearing on Wolfson's motion for a new trial on grounds of newly discovered evidence. Each of those proceedings was accompanied by extensive pre-trial and pre-hearing proceedings. The judge has, in addition, been presented with three motions to disqualify himself, two in the Merritt-Chapman case and one in this proceeding.

Almost from the beginning the proceedings involving Wolfson have been characterized by high tension and acrimony involving Wolfson, his co-defendants, counsel and the court. Aside from the judicial proceedings themselves, there have been a number of extra judicial confrontations between petitioner and the judge. See, for example, pp. 10, 15, below.

1. The Continental Case

Long before the close of the Continental trial Judge Palmieri indicated that he was convinced of Wolfson's guilt. The petition sets forth a series of comments by the court expressing his opinion in unmistakable terms. (App., 127A, et seq.) A few illustrations are:

(a) At a side-bar conference the court, referring to Wolfson and his co-defendant said: "Assuming very charitably that these alleged neophytes blundered into a mistake . . .". (App., 127A.)

(b) At the close of the government's case, and before any defense evidence had been introduced, the court said: "It is clear to me that what they allegedly did and what the proof indicates they did is contrary to the purpose and spirit of the law." (Id.)

(c) A number of character witnesses testified on behalf of the defendants. Commenting on one of them, the court said: "Here you have a very good-looking, impressive gentleman, Governor of the whole State of Florida, who testified in a centurion [sic] voice and makes a fantastic impression on the jury. You bring in a couple more witnesses like this and the prosecution might as well close up and leave the courthouse." (App., 128-9A.)

(d) When Wolfson testified, the court engaged in a running series of sarcastic remarks, making clear his total disbelief in the purport of the testimony. A series of such instances are set forth in the petition (App., 140A), and need not be repeated here.

2. The Bail and Sentence in the Continental Case.

After conviction and before sentence in the Continental case Wolfson was released on bail of $850,000. (App., 88A.) Subsequently, he was sentenced to one year in jail, the maximum fine of $100,000 and to pay the costs

of prosecution. (App., 86A.)

We have found no case between 1954 and 1969 in which bail set by Judge Palmieri exceeded $150,000, other than Wolfson's case, although during that period Judge Palmieri was called upon to set bail for persons charged with most serious crimes and having extensive criminal records. See petition, p.83, fn.5 (App., 88A). 1/

1/ A few instances taken from the court records prior to 1969 illustrate Judge Palmieri's usual practice:

Edward Argenio and Sam Gurtsky, charged with unlawful sale of heroin had bail set at $7,500;

Carmelo Sasoni was released on $2,000 after conviction for the unlawful sale and conspiracy to sell narcotics;

Albert F. Calbrese was released on bail of $1,500 on charges of unlawful possession and distribution of heroin;

John Salvietti and Joseph Consalvo, charged with unlawful sale of heroin and conspiracy were released on bail of $7,500 each;

Bail of $10,000 was set for Frank Russo on identical charges but the bail was reduced to $6,000 on the next day;

George Cargo was likewise charged with the sale of heroin and conspiracy; bail was set for $2,000;

Vincent Zambardi was released on bail of $3,500 pending appeal from a five year sentence for the unlawful sale of heroin;

John Dioguarda (Johnny Dio) was indicted for bankruptcy fraud and released on bail of $15,500;

Michael J. Cassotta was indicted for conspiracy in connection with a pornography smuggling ring. He was released without bail;

Up to 1968 the highest bail ever set by Judge Palmieri was set at $150,000 for John Ormento for conspiracy to violate the narcotics law. (App., 88A.)

3. The Imposition of Sentence in the Merritt-Chapman Case.

Wolfson was scheduled to be sentenced in the Merritt-Chapman case on Friday, December 6, 1968. (App., 93A,170A.) Early in the afternoon on Monday, December 2, one of Wolfson's counsel was advised that Wolfson's wife, living in Miami, was in effect staying alive on a day-to-day basis. (App., 93A,170A.) Wolfson was spending all of his time at his wife's side, and so Wolfson's counsel requested a postponement of the sentence. (Id.) Judge Palmieri, while professing to be concerened and distressed by the situation, nevertheless required Wolfson to travel to New York on Friday morning for sentencing. (Id.) When Mrs. Wolfson learned of the sentence, her condition became progressively worse and she went into shock. She died a few hours after Wolfson returned to her bedside. (App., 93A.) Immediately after his wife's death, Wolfson sent a telegram to the judge reading as follows:

> "My wife passed away at 6:20 A.M. today. Your contribution in hastening her death will never be forgotten. During my life I pledge to do everything to have you removed from the bench through efforts in and out of political office so you will never again be able to do this inhuman act to anyone else. My family vow to carry on if I am not alive. The Lord will stand in judgment of you and with the help of Father John J. Tirella you may ask for forgiveness in church today."

4. Proceedings on the Application for Coram Nobis.

In connection with the present petition, Wolfson was represented by counsel who had not participated in any of the previous proceedings. Counsel estimated that he had spent over 100 hours in preparing the voluminous petition and accompanying exhibits which are now before the court. (App., 180A.)

The petition was filed on May 16, 1975. On July 24, before an answer had been filed, Judge Palmieri wrote to counsel stating that "the voluminous papers filed by petitioner . . . leave the unfortunate impression that they have been prepared with little familiarity with the underlying legal documents on which they are based." (App., 159A.) The court requested the attorneys for Wolfson to file an affidavit covering five items. 2/ This request was evi-

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2/ "1. A conscientious study has been made of all the relevant documents referred to in this petition.

"2. The points made in the petition which have never been previously litigated or adjudicated are specified to be the following. The list should be accurate and complete.

"3. The points referred to in the petition which have been the subject of litigation or adjudication are the following. This list should not only be accurate and complete but should set forth the specific motions, briefs, decisions or adjudications in which the points have been previously made.

"4. The points relating to the Continental Enterprises case are the following.

"5. The points relating to the Merritt-Chapman case are the following." (App., 159A-60A.)

dently occasioned by counsel's failure to note the name of Judge Canella on one of the exhibits to an affidavit in the Continental case, with the result that the petition contained an argument which otherwise would not have been made. See Wolfson's request for reconsideration of motion for recusal, p.6.(App., 166A.)

On August 21, 1975, in the course of a motion for reconsideration of the motion for recusal, counsel pointed out that literal compliance with Judge Palmieri's letter of July 24 would be impossible because it would require a study of thousands of pages of records and exhibits by both Washington and New York counsel. (App., 168A.)

On September 16, the court filed an opinion stating that the petition would be dismissed if the affidavits were not filed within sixty days. (App., 175A,179A.)

On November 13 counsel filed an affidavit, dated November 7, setting forth in meticulous detail his efforts to familiarize himself with the files in the Continental and Merritt-Chapman cases, as directed by the court. (App., 180A-195A.) He complied with the court's direction as to items two and three, fn. 2 above. He complied with item one except insofar as the court's records were unavailable. He stated that it was not feasible to comply with items

four and five, because most points in the petition "apply in one degree or another to both [Continental and Merritt-Chapman] cases." (App., 189A.)[3/]

The affidavit of November 7 did not satisfy the court. On February 9, 1976, the court filed an opinion renewing the directions to counsel, and adding directions that counsel provide additional information concerning which of the unavailable records are listed on the docket sheet and why they are unavailable. (App., 204A-7A.) The court said

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3/ The basis for the latter position had previously been stated more fully in the petition itself:

> "This petition for a writ of error coram nobis is addressed to petitioner's conviction in the [Continental Case]. . . .
>
> "However, in this petition and accompanying and supporting documents, petitioner will from time to time make reference to the [Merritt-Chapman case]. . . .
>
> "It is necessary to mention the Merritt Case from time to time because it is inextricably bound to the Continental Case in many fundamental ways: [specifications omitted].
>
> "Since petitioner claims that he was convicted as a result of a prosecutorial persecution rather than a legal proseuction, the cases are inseparable. However, the Merritt Case is referred to in this petition only when it is essential to do so in order to demonstrate the pattern of misbehavior and unconstitutional conduct involved in the instant Continental Case." (App., 24A-5A.)

the purpose of the directives was to "clarify the matter" (App., 204A) and "keep this matter within appropriate and manageable compass." (App., 207A.)

By this time counsel had come to the conclusion that, given Judge Palmieri's state of mind, there was no possibility that he would decide the petition in favor of Wolfson, and he requested in several letters a prompt disposition of the matter so that this court could hear and determine Wolfson's appeal, at least on the disqualification issue. (App., 222A, 225A, 227A.) One of these letters, dated April 8, 1976, was characterized by the court as "inflammatory." (App., 292A.)

In a letter to counsel dated March 22, 1976, the court said it construed counsel's letters to mean that counsel did not intend to comply with the court's directions. (App., 223A-4A.) The court characterized the posture of the case as "unhappy", but indicated it was prepared "to dispose of the matter on the merits" nevertheless. The court therefore requested the government to respond to the petition within four weeks. (App., 224A.) In a letter dated April 14, 1976, Judge Palmieri's law clerk reiterated the judge's intention to rule on the petition following receipt of the government's response, "notwithstanding the reservations expressed in [the judge's]

letter of March 22, 1976, regarding your failure to comply with the court's order of February 9, 1976." (App., 228A.)

Meanwhile, on January 24, 1976, Wolfson wrote a letter to the editor of the New York Times and sent a copy to Judge Palmieri (App., 320A), without the knowledge or consent of counsel. (App., 211A.) The letter strongly criticized Judge Palmieri's conduct of the Wolfson matter, referring to "kangaroo" proceedings, and stated that Wolfson was "railroaded" although the judge knew he was innocent. (App., 311A, 220A.) The Times did not publish the letter. The court called a conference with counsel concerning the letter on February 19, 1976. (App., 209A.) The judge said he regarded the letter as "offensive, scurrilous, libelous and grossly improper." (App., 214A.) He directed counsel to instruct Wolfson to send no more communications "of any kind" to the court (App., 214A-15A), and he further directed counsel to notify the court if counsel learned of any communication "of a similar nature" from Wolfson to anyone. (App., 216A.)

B. Facts Relating To The Merits Of the Petition.

The record fully establishes violations of Wolfson's Fifth Amendment rights under Brady v. Maryland,

373 U.S. 83 (1963), and his Sixth Amendment right to the effective assistance of counsel.

1. Facts Relating to the Brady Issue.

As this court noted on direct appeal, the principal defense contention at the Continental trial was that the government failed to prove that Wolfson had knowledge of the registration requirement which he was charged with violating. 405 F.2d at 781-2,786.

Wolfson testified that he had no such knowledge. The government sought to prove knowledge via two witnesses: Morley and Duncan. (App., 198A-9A.)

Morley, a securities broker, testified in substance that prior to or during 1958 he had handled American Motors transactions for Wolfson; that in 1958 he received instructions from his superiors not to accept further American Motors sales for Wolfson or his family because to do so would violate SEC regulations; 4/ and

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4/ Morley testified that he told Wolfson that he was instructed to accept "no more" sell orders in American Motors (App., 285A) and, later, that he told Wolfson he could "accept no further sales" of American Motors from Wolfson, his family, or associates. (App., 286A.)

that he communicated this to Wolfson in a conversation which put Wolfson on notice of the regulation. (App., 285A-6A.) So far as Morley's testimony was concerned, this was the sole purported communication between Morley and Wolfson on the subject of Wolfson's knowledge.

Wolfson denied that the Morley conversation occurred. (App., 62A.)

Duncan, a retired SEC employee, was a rebuttal witness. He testified concerning a 1950 meeting of himself, Wolfson and E. Russel Kelly, an SEC lawyer who was deceased at the time of trial. (App., 199A.) Duncan had little or no recollection of the meeting. (Id.) However, after refreshing his recollection by referring to a memorandum prepared by Kelly (trial ex. 21), Duncan was permitted to testify that Kelly told Wolfson of the registration requirement at that meeting. (Id.) 5/

Wolfson denied that he was warned of the registration requirement at the Kelly meeting.

5/ Before appearing to testify, Duncan requested an opportunity to examine other materials from SEC files relevant to the 1950 meeting, but the government denied the request. (Pet., Ex.VI(B), pp. 14, 18.)

In the charge to the jury, the court emphasized the importance of Morley's testimony and of weighing his credibility against Wolfson's:

> "There is that conversation with Morley. Because in this case-and there is no hiding the fact that Morley is a very important witness, because a great many details of significance have been testified to by Morley and denied flatly by the defendants.
>
> "You have to decide-it is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe Gerbert or Wolfson on the other hand, because depending upon which one of these witnesses you believe it will take you a considerable way on the road to deciding the controverted issues in this case.
>
> "You will remember that Morley testified that in 1958 he had a conversation with Wolfson. It wasn't apparently a particularly pleasant conversation. Over the application of the registration requirements on his stock in American Motors Corporation and that in the course of this argument . . . Mr. Wolfson asked Mr. Morley if he thought his lawyers were better than Wolfson's. Mr. Wolfson denied this conversation ever took place. Mr. Morley was quite specific about that conversation, what led to it, what was said, and what he warned Wolfson about. Wolfson denies it.
>
> "There you have one of the many points of conflict between Morley and these defendants, and you will have to resolve these conflicts." (App., 57A.)

At trial Wolfson requested all statements of Morley in the prosecutors' possession. (See App., 197A.) In response, the government produced portions of a transcript of sworn testimony given by Morley before the SEC

in 1965, but did not produce pages 2, 5-9, 12-36, 41-50, 78-93 and 95-105 of the transcript. (App., 197A.) The withheld pages were obtained by Wolfson more than a year after trial.

These pages contain numerous contradictions of Morley's trial testimony. The contradictions are tabulated in Exhibit IX(F) of the petition (App. 102A-15A) and we do not repeat them comprehensively here.

One contradiction merits special attention. At page 86 of the SEC transcript Morley testified that, contrary to his trial testimony, he did not handle American Motors transactions for Wolfson. 6/

2. Facts Relating to Sixth Amendment Issues.

The grand jury began investigating Wolfson on or about August 9, 1966 (App., 282A), following an SEC investigation which began at least as early as 1965. Throughout the SEC and grand jury investigations, Wolfson was represented

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6/ The testimony was as follows:

> "Were you aware at this time, in 1961, that Mr. Louis Wolfson had previously been in difficulty with the S.E.C., that the S.E.C. would have to bring an injunction against him in connection with stock in American Motors Company?
> "A. Yes, we were not involved in that anyway.
> "Mr. Allen: You say you were not involved. Did you carry accounts at that time for Mr. Wolfson?
> "The Witness: American Motors was done through other houses, not us." (App., 103A.)

and advised by Joseph M. Glickstein of Miami. (App., 44A.) Shortly after the grand jury investigation began, Wolfson retained Milton S. Gould of New York to represent him in connection with the investigation. (App., 44A, 49A.) After indictment, Gould continued as chief trial counsel with the assistance and participation of Glickstein throughout. (App., 44A.)

On or about September 18, 1966 Glickstein testified before the grand jury. (App., 100A.) He appeared at the request of the prosecuting attorney who indicated that Glickstein would be subpoenaed if he did not appear pursuant to the request. (App., 97A.) Glickstein cleared his grand jury appearance with Gould beforehand. (Id.) Wolfson did not consent to Glickstein's appearance and he had no knowledge of it until after it occurred. (App., 49A.) The same grand jury indicted Wolfson the following day.

Wolfson has been unable to learn the substance of Glickstein's grand jury testimony. (App., 49A-50A.) Glickstein says he does not remember and has no notes. (Pet., Ex. VII(K), App., 101A.) 7/ The government has

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7/ Glickstein says he does recall that he was "searchingly interrogated" concerning a "so-called promotional" meeting at the Waldorf Astoria allegedly connected with Continental Enterprises. (App., 97A-8A.) But he says he does not recall what he said in response on this or other subjects of inquiry.

refused to produce a copy of the minutes (App., 99A), even though Glickstein joined in Wolfson's request for them. (App., 101A.) The court below denied Wolfson's application for access to the minutes. (App., 310A.) 8/

Glickstein says his grand jury appearance was "a terribly emotional and traumatic experience" to him. (App., 98A.)

Aside from the grand jury testimony of Glickstein, Wolfson alleges that he was denied effective assistance of counsel by the existence of an undisclosed conflict of interest on the part of chief counsel Gould.

The petition alleges that, around the time of Wolfson's indictment and trial, Gould was the subject of an SEC investigation relating to the Canadian Javelin case, and was the subject of a criminal reference report to the Attorney General. (App., 50A-1A.) Counsel 9/ hereby represents that this allegation is based upon a statement to that effect, made to counsel on or about January 27, 1975, by a Department of Justice attorney who worked on the Canadian Javelin investigation. The petition alleges that Gould was aware of the investigation

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8/ The minutes were the subject of item d of Wolfson's motion for discovery, referred to by the court at the cited page. (App., 144A.)

9/ Bernard Fensterwald, Jr., Esq.

and pending threat of indictment, and failed to disclose it to Wolfson. (App., 51A.) Owing to the district court's denial of a hearing and discovery, Wolfson had no opportunity to substantiate this allegation through examination of Gould or otherwise.

ARGUMENT

I.

THE DISTRICT JUDGE ERRED IN REFUSING TO DISQUALIFY HIMSELF BECAUSE HIS CONDUCT OF THE LENGTHY, ACRIMONIOUS TRIALS ESTABLISHES THAT THIS IS A PROCEEDING IN WHICH HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED

In 1974 Congress amended 28 U.S.C. § 455 to provide:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. . . ."

Prior to the amendment, § 455 required disqualification only if the judge concluded that, "in his opinion," it was "improper" for him to sit. 10/

The purpose of the amendment is expressed in the following portion of House Report No. 93-1453, reprinted in 1974 U.S. Code Congressional and Administrative News, p. 6351 at 6354-5:

10/ Unlike 28 U.S.C. § 144, which provides for judicial disqualification upon the "timely" filing of an affidavit meeting standards specified in that statute, § 455 may be invoked on motion of a party at any time. See, e.g., United States v. Ritter, 540 F.2d 459 (10th Cir. 1976), and Rapp v. Van Dusen, 350 F.2d 806, 809 (3d Cir. 1965) (motion before trial); United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974) (motion after trial). Hence, insofar as the district court based its decision on Wolfson's failure to file an affidavit (App., 148A-9A, 294A), the decision is clearly erroneous, as § 455 requires no affidavit.

> "Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase 'in his opinion.' This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. See Edwards v. United States (5th Cir. 1964) 334[F.2d]360. Under the interpretation set forth in the Edwards case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.' Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system."

Thus the issue tendered to the district court and this court is whether this is a proceeding in which Judge Palmieri's "impartiality might reasonably be questioned." The court below decided that issue incorrectly. 11/

11/ In its memorandum and order denying Wolfson's application for disqualification, the court did not even advert to § 455, except to quote a portion of the pre-amendment version in a footnote. (App., 157A, n.5.) Later, in denying Wolfson's motion for reconsideration, the court said there was nothing in amended § 455 to alter the initial decision. (App., 176A-9A.)

Long prior to the amendment of § 455, this court decided United States v. Simon, supra. The court there held that, after a long criminal trial, a district judge should not preside over a re-trial of the same defendant. The ruling was based upon the premise that a lengthy trial automatically gives rise to a "suspicion of partiality" which should be obviated by re-trial before a different judge. 393 F.2d at 91.

The Simon decision was independent of statute and was not concerned with whether there was evidence of actual bias or prejudice. Certainly this court did not suggest in Simon that Judge Bryan was in fact biased against the complaining party, in that case the United States. The rationale for the decision is that long experience has taught that when a judge presides over a lengthy criminal trial, tensions between the judge and parties and counsel are likely to arise. 12/

12/ Following Simon, this court has frequently directed that proceedings following a long or acrimonious trial be conducted by a district judge other than the trial judge. See, e.g., United States v. Stein, Docket No. 76-1299, Slip Op. 211, 227 (2d Cir., October 22, 1976) (resentencing); United States v. Robin, Docket No. 76-1033, Slip Op., p. 5829, 5841 (2d Cir., October 15, 1976) (same); Wiedersum v. National Homes Construction Corp., 540 F.2d 62, 67 (2d Cir. 1976)(new trial); United States v. Yagid, 528 F.2d 962, 965 (2d Cir. 1976) (new trial); United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973), cert. denied 417 U.S. 950 (re-sentencing); United States v. Clark, 475 F.2d 240, 251 (2d

Applying amended § 455 in conjunction with Simon, it is clear that this is a proceeding in which Judge Paomieri's impartiality "might reasonably be questioned," within the meaning of the statute. In Simon this court concluded that Judge Bryan's impartiality might reasonably be questioned merely because he presided over the 17 day first trial. It follows that the same is true of Judge Palmieri who presided over Wolfson's 23 day trial in the Continental case, as well as his seven week trial in the related Merritt-Chapman case.

Moreover, unlike Simon, there is abundant specific evidence here of the existence in fact of the partiality which this court sought to obviate by the prophylactic rule of Simon. At a minimum, this evidence more than substantiates the reasonable suspicion of partiality which, as the Simon court recognized, arises in the mind of litigants and the public whenever a judge has been embroiled in proceedings like those involving Wolfson.

Fn. 12 continued.
Cir. 1973) (new trial). See also Halliday v. United States, 380 F.2d 270, 274 (1st Cir. 1967), aff'd 394 U.S. 831 (1969) per curiam) (2255 application). See also Taylor v. Hayes, 418 U.S. 488, 501-3 (1974), and cases there cited involving criminal contempt hearings.

1. As long ago as the Continental trial, Judge Palmieri's comments indicated that he was convinced of Wolfson's guilt before the defense had started to present its case, thus ignoring the admonition conventionally given to jurors that they should not reach any conclusion until all the evidence is in.

That such things happen frequently in the courtroom is a matter of common knowledge, and perhaps it is unavoidable. But see Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976). While it may have been unavoidable in the Continental trial, however, that is no justification for permitting the same judge to continue to sit on all proceedings arising out of that and related cases.

As any trial lawyer can testify, such running comments by the court make it impossible for a laywer to carry on effectively. They sap the vitality and morale of a defendant and they demonstrate a frame of mind in the court which must necessarily be transmitted to the jury, which is quick to observe the facial expressions and tone of voice of a judge.

Some (but not all) of the comments complained of occurred outside the presence of a jury and hence may not have affected the verdict in the Continental case.

But now there is no jury, and questions arising on this petition ought not to be submitted to a court firmly committed to the view that petitioner is guilty.

The district court argues that the same material was presented to this court on Wolfson's earlier motion to recuse the judge in the Merritt-Chapman case and was found insufficient. (App., 151A-3A.) To this there are two answers. The prior decision of this court in the Merritt-Chapman proceeding was in 1968. Since that date § 455 has been substantially amended to substitute an objective standard for the pre-1974 subjective standard.

Equally important, events since 1968 contain additional evidence of bias not presented to the court in 1968. The impartiality of the court must be evaluated in the light of the totality of the evidence of bias or, under the § 455 standard, in the light of the totality of circumstances creating a situation "in which his impartiality might reasonably be questioned." United States v. Ritter, 540 F.2d 459, 464 (10th Cir. 1976). 13/

13/ In Ritter the court granted the government's petition for mandamus and ordered the district court disqualified pursuant to amended § 455. The government attempted to show that the judge was biased in fact, relying primarily on pretrial rulings by the judge which were unfavorable to

2. The bail set in the Continental case was extraordinarily high, explicable only in terms of the court's animus towards Wolfson.

Such extraordinary bail is almost unknown except where the most serious crimes are charged and where the risk of flight is significant. Indeed, the relevant statute provides that, in setting bail the primary considerations are the possibility of flight or that the defendant will "pose a danger to any other person or to the community." 18 U.S.C. § 3148. There was in this case no reasonable likelihood of flight

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Footnote 13 continued.
the government and on the judge's "caustic and curt" or "disagreeable" attitude towards the government, as contrasted with a "deferential" or "friendly and apologetic" attitude towards opposing counsel. 540 F.2d at 463. The court found no actual bias on the part of the judge, id., but held that the judge's impartiality nevertheless might reasonably be questioned "in light of the total facts." Id. at 464.

On the appeal of the Merritt-Chapman motion for recusal this court said that the remarks attributed to Judge Palmieri "were taken somewhat out of context." 396 F.2d at 125. The "context" in which the judge's comments must presently be considered includes not only the Continental trial but the entire picture of the conduct of Judge Palmieri. In such a context the judge's comments show exactly what Wolfson claims here; namely, that the judge had complete contempt for the evidence submitted in Wolfson's behalf, and a deep conviction that petitioner is an unworthy and dishonest person whose violation of the law was clear. It can hardly be said after reading that record that Judge Palmieri was prepared to give any weight at all to Wolfson's argument that he was entitled to a new trial to establish his innocence.

and certainly no danger to any other person or to the community. It is difficult to understand why such bail was set unless the judge was determined to vent his ill will on Wolfson. The sentence also was a severe one considering the nature of the offense. Wolfson had no previous criminal record. The charge involved a violation of a complex and little-understood statute and there was no charge or proof of fraud. 14/

This point too was raised on the petition for recusal in the Merritt-Chapman case and rejected by this court which said that excessive bail, sentence and fine "are not grounds for disqualification." 396 F.2d 121, 125.

Again, however, the relevant statute has been changed since 1968, and the excessive bail, sentence and fine are presented as a part of a totality of circumstances which must be considered by this court.

14/ A survey of all SEC enforcement proceedings from 1935 to 1966 (App., 116A) discloses that only 10 of the 471 Section 5 enforcement proceedings were criminal proceedings. Each of the criminal cases involved notorious elements of fraud. (App., 74A.)

An additional point, however, must be emphasized. The bail, sentence and fine were not only excessive in an absolute sense; they were also very far in excess of the bail, sentence and fine customarily imposed by Judge Palmieri in other cases. The departure in this case from his usual practice was not trivial or insubstantial. It is startling and, while there may be some explanation, we have not yet heard it from the judge, nor has the government suggested why Judge Palmieri should routinely release heroin peddlers, after conviction, on bail ranging from $1,500 to $10,000, while setting Wolfson's bail at $850,000.

It may be argued that such variations in practice were not evidence of the bias required to meet the provisions of § 455 in 1968. But such unexplained variations are certainly sufficient to meet the requirements of § 455 as amended in 1974.

3. Like the bail, the circumstances surrounding the sentencing in the Merritt-Chapman case evidence judicial hostility to Wolfson.

Under the circumstances any judge (normally including Judge Palmieri) would have postponed sentence indefinitely until after the death of Mrs. Wolfson and a

reasonable period of mourning. 15/ No credible reason has been suggested for the extraordinary conduct of the judge. 16/ We need not leave to this court's imagination the effect that such treatment had on Wolfson, as it is disclosed in Wolfson's telegram to the judge, quoted above.

4. The method by which Judge Palmieri disposed of the present petition, and particularly his treatment of Wolfson's counsel, presents still further evidence as to the bias or apparent bias of Judge Palmieri. Indeed the tone of his opinion in its entirety indicates that it was written in a temper, as though Wolfson was wasting the court's time with frivolous arguments. As will appear below, Wolfson's arguments are far from frivolous. They raise grave problems concerning Wolfson's

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15/ For example, Wolfson's co-defendant was scheduled for sentencing on the same day, but his sentencing was postponed for 40 days because of illness. (App., 163A.)

16/ The government, in opposing Wolfson's petition, suggested that there was no evidence of the facts alleged by Wolfson or that the court knew of them. Judge Palmieri in his opinion admits knowing the facts, but suggests that the sentencing proceeded on December 6 with Wolfson's consent. (App., 158A.) The record indicates otherwise. See the contemporaneous letter from Hogan and Hartson to Wolfson dated December 13, 1968 (App., 170A), and Wolfson's telegram to Judge Palmieri, quoted above.

constitutional rights, problems which merit serious consideration. Instead, none of Wolfson's points was treated seriously.

Apart from anger, hostility and bias, there is no justification for Judge Palmieri's treatment of Wolfson's counsel in upbraiding him for lack of total familiarity with the voluminous trial record and in requiring an unprecedented and exacting affidavit concerning the record. 17/

The series of litigations affecting Wolfson has been long and complex and the files in the case are extensive. It is doubtful whether anyone could be so familiar with those files as to make occasional errors unavoidable. 18/

17/ The court's reliance, as a basis for denying the petition on the merits, on counsel's failure to comply fully with these requirements is discussed in Point III below.

18/ This applies not only to Wolfson and his counsel, but even to Judge Palmieri. In his opinion denying the petition, he states that the Merritt-Chapman case resulted in a nolle prosequi of the charges against Wolfson. (App., 288A.) He states that there was no judgment of conviction in the Merritt-Chapman case. (App., 318A.) Indeed, his opinion seems in some obscure way to rest on that fact, at least in small part. But there was a conviction in the Merritt-Chapman case. To avoid an unprecedented fourth trial, Wolfson pleaded nolo contendere and was fined. This illustrates that errors are sometimes made even by those whose connection with this case is much longer and more intimate than that of present counsel.

Further, it should have been evident to the judge that counsel could not reasonably comply with the judge's directive to assign "points" to either the Continental case or the Merritt-Chapman case. The petition which Judge Palmieri was considering in 1975 was not a petition to disqualify himself from trying either the Continental case or the Merritt-Chapman case, but a motion to disqualify him from deciding this petition for coram nobis on the ground that he was biased. Such bias is not necessarily attributed to a "case." It may, and often does, manifest itself in some other case or in extrajudicial conduct.

The court's characterization of counsel's letter dated April 8 as "inflammatory" was unwarranted and evinces animus, as a fair reading of it would indicate merely that Wolfson wanted to move this case into a posture in which it could be appealed. Cf., United States v. Proctor & Gamble Co., 356 U.S. 677,680-81 (1958).

If further evidence of the judge's anger, hostility and loss of objectivity is needed, it may be found by reading through the transcript of the conference on February 19, 1976, concerning Wolfson's letter to the Times. (App., 208A-222A.) With all respect, it is fair to say that the transcript seethes with judicial ill temper.

In sum, the record, replete with evidence of high feelings on the part of the judge, leaves no doubt that he has lost the objectivity which must be maintained by a court if our judicial system is to function properly. It matters not whether Judge Palmieri has in fact lost objectivity or whether he only appears to have lost it. Likewise, it matters not whether the judge's frame of mind is the "fault" of Wolfson or even the necessary and inevitable result of Wolfson's conduct. Defendants in criminal cases are not required or expected to be objective about their fate; few defendants could meet such a test and Wolfson certainly is not one of them. But the role of the judge is a different one, and loss of objectivity is a luxury which he is not allowed. Self-disqualification based on the standards set forth in § 455(a) does not reflect discredit to the judge; the contrary is true. And if the judge has so lost his objectivity that he cannot even recognize that fact, or if it only reasonably appears that such is the case, the appellate court should, in the interest of justice and the appearance of justice, direct that the proceedings be submitted to another judge. Such a direction likewise does not reflect discredit upon "either the integrity or sincerity of the judge." United States v. Ritter, supra, 540 F.2d at 464.

II.

THE DISTRICT COURT ERRED IN DENYING THE PETITION BECAUSE IT ADDUCES NEWLY DISCOVERED FACTS WHICH ESTABLISH THAT WOLFSON WAS CONVICTED IN VIOLATION OF HIS FUNDAMENTAL FIFTH AND SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL AND THE ASSISTANCE OF COUNSEL.

We agree with the district court's statement of the applicable general principle, namely that Wolfson is entitled to an evidentiary hearing on his petition "if he alleges facts that would support a claim of constitutional dimension, Smith v. O'Grady, 312 U.S. 329 (1941) and puts some material issue of fact into dispute [citations omitted]." (App., 297A.) Needless to say, if the petition establishes Wolfson's constitutional claims by undisputed facts, he is entitled to relief without need of a hearing.

The judge failed to apply the principle which he correctly articulated. By way of undisputed facts, the petition shows that Wolfson was denied his Fifth Amendment right to a fair trial in that the prosecutors withheld vital exculpatory evidence which Wolfson requested. Brady v. Maryland, 373 U.S. 83 (1963). This alone is sufficient to require issuance of the writ without resort to a hearing. Cf., United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

Undisputed facts in the petition and the trial record also establish that Wolfson's Sixth Amendment rights were abridged in that the government coerced his counsel,

Glickstein, to testify before the grand jury on the day before it handed down the indictment. Further, the petition alleges that, owing to an undisclosed conflict of interest on the part of chief defense lawyer Gould, Wolfson failed to receive the effective assistance of counsel as guaranteed by the Sixth Amendment. While Wolfson does not possess all of the facts necessary to prove the latter Sixth Amendment violation, the petition is more than adequate to entitle him to a hearing preceded by limited discovery. 19/

19/ The district court did not question Wolfson's right to discovery in aid of litigating a legally sufficient petition for coram nobis. The court merely denied the discovery requests on the basis of its ruling that the petition was insufficient. There can be no serious doubt that discovery is available in coram nobis, no less than in habeas corpus or a 2255 proceeding. See Harris v. Nelson, 394 U.S. 286, 300 (1969), a 2255 case, where the Court held:

> "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the 'usages and principles of law.' [quoting 28 U.S.C. § 1651.]"

The petition tenders several other claims upon which Wolfson is entitled to a hearing. 20/ However, it is unnecessary to discuss them in detail here. As we now show, Wolfson is entitled to relief based upon the Fifth and Sixth Amendment claims referred to above. In the event, however, that this court should remand for further proceedings apart from issuance of the writ, Wolfson's other claims will then be presented to the district court. 21/

20/ The other allegations include the following: the indicting grand jury was partial to the government in that the foreman was a friend of the United States Attorney and the prosecuting Assistant United States Attorney, and at least an acquaintance of Judge Palmieri,(App.,28A);prosecutorial misconduct and conflicts of interest, in the form of knowing use of perjured testimony (App., 59A-69A), threatening witnesses (App., 35A-6A), deliberately misleading the jury (App., 39A-40A), assignment of Judge Palmieri's former law clerk, Paul Galvani, to the prosecution staff (App., 56A), the existence of a long and bitter personal feud between Wolfson's co-defendant Gerbert and the father of chief prosecutor Grand (App., 55A-6A), and invidiously discriminatory prosecution based upon an SEC "enemies list" containing Wolfson's name (App., 69A-82A.)

21/ The district court properly did not question the averment in the petition (App., 18A-19A), concerning Wolfson's stake in having his conviction vacated after completion of his jail sentence. Among other things, Wolfson has a stake in recovering the fine and costs imposed upon him, and in repairing the damage which the conviction continues to cause to his reputation and business career. Id. Likewise, the court properly did not question the timeliness of the petition under the circumstances. (App., 15A-17A.)

A. Brady Claim

The exhibits to the petition establish that the prosecutors refused to disclose material exculpatory evidence which Wolfson had requested, in violation of the principle of Brady v. Maryland, 373 U.S. 83 (1963). This alone entitled Wolfson to the writ. United States v. Keogh, supra, 391 F.2d at 147.

The undisclosed exculpatory evidence was contained in the withheld portions of Morley's 1965 testimony before the SEC. 21/

We emphasize the key role of Morley in the prosecution. The importance of Morley's testimony was heightened by the weakness of Duncan's rebuttal. Unlike

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21/ Wolfson based his request on 18 U.S.C. § 3500, and the portions which were produced were designated exhibit 3504A. (App., 197A.) Cf., United States v. Badalamente, 507 F.2d 12, 17-18 (2d Cir. 1974), cert. denied, 421 U.S. 911. Perhaps for this reason the court below apparently regarded Wolfson's present claim as a § 3500 issue, not a Brady issue, and ruled that it is foreclosed to Wolfson by his failure to raise it on direct appeal in accordance with the procedures in § 3500. (App., 314A.) Assuming without conceding that the judge's ruling could be sustained if the withheld portions were merely § 3500 material, it is clear that Wolfson has not waived his constitutional rights under Brady. As in this case, Brady material is frequently discovered after conviction and direct appeal, see, e.g., Brady v. Maryland itself, and we know of no case holding that issues involving newly discovered Brady material are foreclosed or waived by failure to raise them on direct appeal.

Morley, Duncan had no real recollection of what he testified to, perhaps because of his advanced age and the fact that the meeting with Kelly and Wolfson occurred 17 years before the trial. 22/ Further, that meeting occurred more than ten years before the transactions for which Wolfson was indicted, while Morley's purported conversation with Wolfson occurred only two years before the transactions. Thus, if Morley were believed, his recent warnings to Wolfson were far more probative of guilty knowledge than anything occurring in the long past meeting with Kelly.

Morley's key role was well recognized by the court when charging the jury that "there is no hiding the fact that Morley is a very important witness" whose credibility the jury must weigh against Wolfson's. In the same portion of the charge the court emphasized the conflicting testimony between Wolfson and Morley concerning the American Motors conversation.

22/ Also, while Duncan was permitted to refer to trial exhibit 21 for purposes of refreshing his recollection, he was denied access to the remainder of the relevant file.

While all of the undisclosed contradictions between Morley's testimony at trial and before the SEC would have been highly useful in attacking his credibility, the undisclosed SEC testimony concerning American Motors refutes the very essence of Morley's incriminating trial testimony. If Morley did not handle American Motors transactions for Wolfson, the alleged conversation concerning continued sales of American Motors by Morley obviously could not have occurred. Had the jury known that only two years earlier Morley testified under oath that he was not involved in American Motors transactions for Wolfson, they would surely have entertained a reasonable doubt concerning the truth of Morley's contrary trial testimony. See United States v. Badalamente, supra, 507 F.2d at 17-18, for a case involving a remarkably similar situation. 23/

23/ In Badalamente, the chief witness against appellant Yagid was one Allen. Allen's incriminating testimony was disputed by Yagid, and hence the credibility of Allen became a crucial issue for the jury to resolve. The prosecution failed to disclose certain letters written by Allen to the trial judge and others, the tenor of which suggested that Allen was either under pressure from the U.S. Attorneys, a liar, or deranged. The letters came to Yagid's attention after trial. This court reversed and remanded for a new trial. The court held that the government's failure to disclose the letters was a fatal violation of 18 U.S.C. § 3500. Further:

> "Although the prejudicial failure to produce the material in accordance with 18 U.S.C. § 3500 is

In any event, the government's failure to disclose this information entitles Wolfson to a new trial without regard to its probable effect on the jury. To be sure, in cases where defendants fail to request such material, and where the prosecution's failure to disclose it is merely negligent or inadvertent, it may sometimes be necessary, before ordering a new trial, to consider whether disclosure at the first trial would probably have affected the verdict. See, e.g., United States v. Agurs, ___U.S.___ 96 S.Ct. 2392 (1976); Brach v. United States, Slip Op., p.5487, Docket No. 76-2040 (2d Cir., September 9, 1976); United States v. Keogh, supra, 391 F.2d at 146-8. But where, as here, requested information is withheld, a new trial is automatically required if the information is "material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, supra, 373 U.S. at 87. While there may be cases where the "materiality" of undisclosed information is open

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Footnote 23 continued.

> enough to require reversal and a new trial, we think that as the trial continued after Yagid testified--where his testimony made the credibility of Allen crucial to the determination of Yagid's guilt or innocence--the nonproduction of the Allen letter to the trial judge and the Allen letters to other public officials was a violation of the rule in Brady v. Maryland, 373 U.S. 83. . . ." 507 F.2d at 18.

to dispute, this is not such a case. The American Motors conversation and Morley's credibility were crucial, and it cannot be denied that the undisclosed testimony is highly material to both.

B. Sixth Amendment Claims

1. Glickstein Grand Jury Appearance

Under settled decisions, Glickstein's appearance and testimony before the grand jury violated Wolfson's Fifth and Sixth Amendment rights.

The leading case in this area is Judge Frankel's influential decision in In re Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966). Terkeltoub, an attorney, was retained to defend one Fiorillo against a federal perjury indictment. A month after the indictment Terkeltoub was called before a grand jury and questioned concerning a meeting of himself, Fiorillo and a possible defense witness. Terkeltoub refused to testify and the government moved to compel.

Judge Frankel deried the motion, holding that "the attorney was not only entitled, but probably required, to withhold answers to the grand jury's questions." 256 F.Supp. at 684. He reasoned that compulsory grand jury inquiry invaded "the privacy and confidentiality of the lawyer's work in preparing the case," 256 F.Supp. at 685,

and violates his client's Fifth and Sixth Amendment rights no less than a surreptitious invasion such as electronic eavesdropping on defense councils. Id. 24/

In the trial of Maurice Stans (and John Mitchell) the court had occasion to apply Terkeltoub in circumstances even closer to those at bar. United States v. Mitchell, 372 F.Supp. 1239, 1244-46 (S.D.N.Y. 1973). Three grand juries were investigating the transactions for which Stans was indicted. Stans was also involved in civil litgation concerning these transactions. He retained an attorney, Parkinson, to represent him in both matters. In April 1973 Parkinson ceased representing Stans in connection with the grand jury, but continued on the civil matters.

On May 4, 1973, in a private meeting, an Assistant United States Attorney obtained certain documents from Parkinson relating to Stans. On the same day Parkinson testified before one of the grand juries. Subsequently, the indictment was returned by a different grand jury.

24/ Citing Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), cert. denied, 349 U.S. 930 (1955); and United States v. Andreadis, 234 F.Supp. 341 (E.D.N.Y. 1964).

Stans moved to dismiss the indictment, or in the alternative, to suppress the documents which Parkinson gave the government. Applying Terkeltoub, the court held that Stans' Fifth and Sixth Amendment rights were invaded both by Parkinson's testimony before the grand jury and by his delivery of the documents, and it granted the motion to suppress. 372 F. Supp. at 1246.

The court declined to dismiss the indictment only because "[b]y an accident of fate, Parkinson's testimony never reached the ears of the indicting Grand Jury." Id.

In In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973), the court reversed an order requiring an attorney to testify before a grand jury investigating his corporate client. The court relied almost exclusively on Terkeltoub, although it emphasized violations of the work product rule, rather than the Fifth and Sixth Amendments, perhaps because the attorney's client was merely under investigation.

However, as recognized in United States v. Mitchell, supra, the existence of a grand jury inquiry is sufficient to bring into play the Fifth and Sixth Amendment rights of its targets. See also Escobedo v.

Illinois, 378 U.S. 478 (1964). This is all the more true in a situation like the present case where Wolfson's long time counsel appeared before the indicting grand jury on the day before the indictment came down.

In United States v. Colacurcio, 499 F.2d 1401 (9th Cir. 1974), defense counsel was called before a grand jury after indictment and questioned about his alleged involvement in an attempt to bribe a witness. The defendant moved to dismiss the indictment. The district court held a hearing and received "lengthy affidavits," the grand jury transcript and certain statements submitted in camera, 499 F.2d at 1404. The court denied the motion, id., after barring the government from using the testimony in the Colacurcio trial on pain of dismissal. 499 F.2d at 1403.

The court of appeals affirmed. The court stated:

> "We fully share the views expressed by Judge Frankel in Re Terkeltoub [sic], 256 F.Supp. 683 (D.C., S.D.N.Y. 1966), that generally it is grossly improper for a district attorney to seek to compel a lawyer to testify concerning his work in preparing a defense for his client. The likelihood that this drastic move will have at least a slightly chilling impact upon the lawyer's advocacy is indeed great, but more important, perhaps, is the invasion of the lawyer's privacy in his preparation. . . .

> "We nevertheless are not persuaded that Judge Powell's ruling requires a reversal. . . .
>
> "From our own study of all these materials, we are satisfied, as was Judge Powell, that the inquiry extended wholly to matters collateral to the criminal case and that Neubauer's professional talents were in nowise appreciably impaired." 499 F.2d at 1404.

In short, the indictment was upheld only because counsel's testimony was not used at the trial and because the district court made specific findings, supported by evidence adduced at the hearing, that the grand jury inquiry did not relate to the Colacurcio prosecution and that counsel's effectiveness was unimpaired by the inquest.

The foregoing decisions leave little doubt that Glickstein's grand jury appearance violated Wolfson's fundamental constitutional rights. This is so regardless of the substance of Glickstein's testimony. See United States v. Mitchell, supra, where the court did not even refer to the nature of the information given by Parkinson either in the documents or his grand jury testimony. 25/

A principal constitutional vice identified in the Terkeltoub line of cases is the "chilling impact upon counsel for defendants in criminal cases" which results

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25/ In the present case, moreover, Glickstein makes clear that he gave substantial testimony relating to Continental although he does not remember the details.

from the mere fact of compelled grand jury appearance on matters relating to their clients' alleged wrongs. In re Terkeltoub, supra, 256 F.Supp. at 685. See also United States v. Colacurcio, supra, 499 F.2d at 1404. 26/ That vice was present in this case, as evidenced by Glickstein's characterization of the experience as "a terribly emotional and traumatic experience." It is a vice which exists without regard to the substance of the testimony given. 27/

Accordingly, Wolfson is entitled to the writ without need of a hearing or discovery.

Alternatively, a hearing and disclosure of the minutes of Glickstein's grand jury testimony might well reveal additional and aggravated violations of Wolfson's rights, such as testimony concerning Wolfson's defense strategies and preparations, testimony concerning matters learned from Wolfson by Glickstein in confidence, or testimony which was used by the prosecution at trial, either directly or indirectly. Hence if this court should decline to order issuance of the writ based upon what is

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26/ Glickstein's appearance was no less compulsory because he appeared under threat of subpoena instead of an actual subpoena.

27/ For a partial discussion of the respects in which Wolfson's defense was in fact inadequate, see pp. below.

already established, the court should, at a minimum, remand for discovery and a hearing. Cf., United States v. Colacurcio, supra. 28/

28/ There are several eventualities based upon this violation of Wolfson's rights. If, as indicated by the record, Glickstein's effectiveness was impaired, dismissal of the indictment may be required. United States v. Colacurcio, supra. The same is true if the government used information obtained from Glickstein at trial. Id.; United States v. Mitchell, supra. Unlike the latter case, Glickstein's testimony was given to the indicting grand jury, and hence there is no "accident of fate" which saves the indictment. 372 F.Supp. at 1246.

If Glickstein's testimony formed a substantial part of the basis of the indictment, the district court has discretion to dismiss it. United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964). When a matter is committed to the court's discretion, that discretion must be exercised one way or the other based upon the relevant factual materials, United States v. Brown, 470 F.2d 285, 287-8 (2d Cir. 1972), and the court below did not even purport to do so.

If the indictment is not dismissed, a new trial is automatic. See Black v. United States, 385 U.S. 26 (1966). In Black, while the case was in the Supreme Court, it was discovered that FBI agents had electronically eavesdropped upon conversations between Black and his counsel during the grand jury investigation which led to Black's indictment. There was no evidence that information obtained by the eavesdrop was used in any way by the prosecutors, either before the grand jury or at trial. The government argued that the Court should remand for a hearing to determine whether there had been uses of the information which entitled Black to a new trial. The Court rejected this argument, vacated the conviction and remanded for a new trial, so as to "permit the removal of any doubt as to Black's receiving a fair trial." 385 U.S. at 29. To the same effect, see O'Brien v. United States, 386 U.S. 345 (1967).

There are no conceivable circumstances under which Wolfson is not entitled, at a bare minimum, to a hearing below to determine the effects of the grand jury appearance on Glickstein and the uses to which his testimony was put by the prosecutors.

Wolfson cannot be held responsible for the failure of his counsel to raise this issue at trial. The rights at stake were Wolfson's, not counsel's. Glickstein and Gould either failed to realize that Glickstein's actions violated their client's basic rights, or they acted in wanton disregard of his rights. Under these circumstances, counsel could no more waive or forfeit Wolfson's Sixth Amendment rights than if this were a more typical case of ineffective representation. It is inherent in the nature of this kind of issue that counsel will not raise his own derelictions as a defense at trial. To assert this point would be to assert that counsel themselves had acted so as to violate their client's basic rights, and few attorneys can be expected to do this. As the court recognized in the similar setting of United States v. Mitchell, supra:

> "The decision to 'volunteer' information of this nature rests with the client. Parkinson's erroneous conclusion that the information could not be withheld can in no way be imputed to Mr. Stans nor can the 'fruits' of that conclusion be used to the detriment of the defendant." 372 F.Supp. at 1246.

In a footnote to the quoted passage, the court said:

> "This statement is in no way intended to reflect upon Mr. Parkinson's competence as an attorney or his conduct in this matter. It is clear that at the time of the events under examination, neither Mr. Parkinson nor

> the Assistant United States Attorney were cognizant of the Terkeltoub decision and its possible consequences. We find unequivocally, that Mr. Parkinson turned over the documents in question believing there were no valid grounds for withholding them." Id.

In any event, failure to raise fundamental constitutional error at trial is no bar to raising it in post-conviction proceedings. See, e.g., Kaufman v. United States, 394 U.S. 217, 222 ff. (1969).

2. Gould Conflict of Interest.

Effective assistance of counsel requires that the defendant's representation "be untrammeled and unimpaired" by having his "lawyer simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). "[Effective] representation is lacking . . . if counsel, unknown to the accused and without his knowledgable assent, is in a duplicitious position where his full talents -- as a vigorous advocate having the single aim of acquittal by all means fair and honorable -- are hobbled or fettered or restrained by commitments to others." Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962). See also, United States v. Carrigan, Docket No. 74-2056, Slip Op., 389 (2d Cir., Nov. 3, 1976); Randazzo v. United States, 339 F.2d 79, 81 (5th Cir. 1964).

A fatal conflict of interest exists when defense counsel has a relationship which might hamper or limit the

exclusive devotion of his energies and abilities to the representation of his client. Thus, for example, counsel is compromised if he has an existing relationship with the prosecutors, Kelly v. Peyton, 420 F.2d 912 (4th Cir. 1969), or a prosecution witness, Randazzo v. United States, 339 F.2d 79 (5th Cir. 1964); Porter v. United States, 298 F.2d 461 (5th Cir. 1962); Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); and Zurita v. United States, 410 F. 2d 477 (7th Cir. 1969). 29/

The instant petition alleges a most serious conflict in that Gould's loyalties were split between protecting his own interests and those of Wolfson. In such a situation counsel cannot act with the degree of loyalty guaranteed by the Sixth Amendment. The investigation and threat of criminal prosecution inevitably chilled his representation of Wolfson. Cf., In re Terkeltoub, supra, 256 F.Supp. at 68[illegible]. Gould was at the very least obligated to notify his client and the trial court of the existence of the criminal investigation and leave to him the decision as

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29/ Even when there is no current relationship between the attorney and a witness, the existence of a past or a possible future relationship may be a sufficient potential conflict to disable counsel under the Sixth Amendment. Tucker v. United States, 235 F.2d 238 (9th Cir. 1956).

to whether he wished to be represented by a lawyer operating under those inhibitions. Cf., United States v. Jeffers, 520 F.2d 1256, 1263 fn. 11 (7th Cir. 1975), cert. den., 423 U.S. 1066 (1976).

It was incumbent upon the court below to hold an evidentiary hearing to determine whether defense counsel knew that he was the subject of a criminal investigation. See United States v. Hayman, 342 U.S. 205 (1952). 30/ Cf., United States v. Carrigan, supra, Slip Op. at 393. See also, Zurita v. United States, supra, vacating the district court's denial without evidentiary hearing of a motion to vacate sentence based on alleged conflict, and remanding for a hearing; Porter v. United States, supra, 298 F.2d at 464, reversing the district court's dismissal as frivolous of a § 2255 petition based on defense counsel's conflict and remanding for an evidentiary hearing; Tucker v. United States, 235 F.2d 238 (9th Cir. 1956), reversing and

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30/ In Hayman, a federal prisoner applied for relief under 28 U.S.C. § 2255 on the ground that, unknown to him until after trial, his defense counsel also represented a prosecution witness, in violation of the Sixth Amendment. The district court held a three day hearing, without notice to or appearance by Hayman, and denied the motion after finding that Hayman knew of the conflict during trial and nevertheless consented to counsel's continued representation of him. 342 U.S. at 208-9. The Court remanded for another hearing at which Hayman could appear and testify.

remanding the district court's dismissal without hearing of a coram nobis petition based on defense counsel's conflict of interest.

If Wolfson's allegations are substantiated at the hearing, he will be entitled to a new trial without showing actual prejudice at the first trial. However, the petition alleges a number of respects in which Gould's representation was in fact inadequate. (App., 44A-55A.) 31/ These glaring errors, despite Gould's experience and prominence, confirm that Wolfson failed to receive his constitutional right to "a vigorous advocate having the single aim of acquittal by all means fair and honorable," in that his chief counsel was "hobbled or fettered or restrained" by an inhibiting conflict of interest. Porter v. United States, supra, 298 F.2d at 463.

31/ We have previously discussed one of these, namely Gould's authorization, without Wolfson's knowledge or consent, of Glickstein's grand jury appearance, contrary to the principle of In re Terkeltoub, supra. Others include his prejudicial failure to make the routine discovery motion under Rule 16 of the Federal Rules of Criminal Procedure, and failure to utilize two exculpatory letters in his possession. (App., 45A-7A.)

III

THE COU T ERRED IN DENYING THE PETITION FOR FAILURE OF COUNSEL TO FOLLOW THE COURT'S DIRECTIONS, BECAUSE THE DIRECTIONS WERE UNREASONABLE AND UNLAWFUL, COUNSEL SUBSTANTIALLY COMPLIED WITH THE DIRECTIONS, AND DENIAL OF THE PETITION IS TOO DRASTIC A SANCTION FOR COUNSEL'S ALLEGED DERELICTIONS.

The court based its denial of the petition in part on an asserted "flagrant disregard of the Court's directions" by Wolfson's counsel. The court cited Rule 41(b) of the Federal Rules of Civil Procedure, Harris v. Nelson, 394 U.S. 286, 299 (1969), and 28 U.S.C. § 1651. Neither these nor any other authorities support the court's drastic action in denying a serious post-conviction application under the circumstances here presented. 32/

32/ Harris v. Nelson, supra, merely holds that it is appropriate to apply provisions of the Federal Rules of Civil Procedure in coram nobis proceedings. We agree that Rule 41(b) applies but, as demonstrated in the text below, that rule does not support the court's position. Section 1651, the All Writs Statute, likewise adds nothing to the court's powers under Rule 41(b), which deals specifically with the subject of dismissal for failure to comply with court orders. Compare the analogous situation in Societe Internationale v. Rogers, 357 U.S. 197, 207 (1958), where the Court reversed a dismissal based in part on Rule 37, in part on Rule 41(b) and in part on "inherent power." The Court said that the power of dismissal for violation of discovery orders "depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery. . . . Reliance upon Rule 41 . . . or upon 'inherent power', can only obscure analysis of the problem before us."

"Dismissal with prejudice is a drastic sanction to be applied only in extreme situations [citations omitted]." Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914 (2d Cir. 1959) (reversing dismissal based in part on Rule 41 (b)). The power to impose this sanction is extremely limited, "in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. . . . [T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale v. Rogers, supra, 357 U.S. at 209 (reversing dismissal based in part on Rule 41(b)).

The conduct of Wolfson's counsel does not merit any sanctions, let alone dismissal. First, the court had no authority to issue the directives in question. The directives essentially sought a bill of particulars, characterized by the court from the outset as a "clarifying statement" of the petition's claims. (Letter of July 24, 1975, App. 160A.) A similar situation arose in Michael v. Clark Equipment Co., 380 F.2d 351 (2d Cir. 1967). The district court dismissed the complaint in part for "failure of plaintiff to comply with an order of the court to set forth his cause of action clearly [citing Rule 41 (b)]," 380 F.2d at 351-2. This court reversed, stating:

> "There is no justification in the Federal Rules for an order to a plaintiff 'to set forth his cause of action clearly'. . . . The order of the district court seems to have been designed to require something in the nature of a bill of particulars. But there is no requirement under the Rules that plaintiff provide a bill of particulars.
>
> "A great deal of time has been spent in this case in a struggle to get the plaintiff's pleading into better shape. As this court has often remarked, time spent in this way is usually wasted [citations omitted]. A better procedure than the so-called 'trial' of 'preliminary issues' would have been to proceed at once to a consideration of the merits either by means of a motion for summary judgment or of a full trial of the factual issues presented by the pleadings.
>
> "Reversed." 380 F.2d at 352.

Second, by means of his meticulous affidavit and attachments of November 7, 1975, counsel substantially complied with the directives except insofar as compliance was impossible in which case he supplied the court with reasonable explanations.[33/] The only directive to which counsel

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33/ As to the directive to allocate points between the Continental and Merritt-Chapman cases, counsel made clear his position that events in the Merritt-Chapman case constituted evidence of the existence in the Continental case of such

did not so respond was the directive to supply a list of missing court records, although he did give the court an exhaustive listing of all records which were not missing Taken in context, this provides no basis for a sanction which deprives Wolfson of consideration of the merits of his claims.

Numerous decisions emphasize that the sanction of dismissal may be employed only when less drastic sanctions prove unavailing. See, e.g., Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1339 (9th Cir. 1970); Flaska v. Little River Marine Construction Co., 389 F.2d 885, 887-8 (5th Cir. 1968), cert. den., 392 U.S. 928. This is especially so where, as here, the sanction stems from alleged derelictions of counsel, not the litigant.

Rarely, if ever, does an act of counsel justify imposing this grave penalty on his client. Certainly before doing so it is incumbent upon the court to threaten or impose sanctions upon counsel, such as a formal reprimand or, in an extreme case, contempt. See, e.g., Flaska v. Little River

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Footnote 33 continued.

vices as prosecutorial misconduct, selective prosecution and judicial bias. This is a valid legal theory which counsel was entitled to adhere to, notwithstanding the judge's wish that he would eliminate factors relating to the Merritt-Chapman case.

Marine Construction Co., supra, 389 F.2d at 887-9. See also In re Sutter, Docket No. 76-1194, Slip Op., p. 179, 191 (2d Cir., October 20, 1976), collecting cases. As demonstrated above, no sanctions were warranted against anyone in this case. However, even if the contrary were true, the law and fundamental fairness require the court to employ lesser sanctions before resorting to the ultimate sanction of dismissal.

Finally, the extreme sanction of dismissal may not be imposed, as it was here, without warning. 34/

34/ In its letters of March 22 and April 14, 1976, the court indicated that it would address the merits of the petition upon receipt of the government's papers. While the judge expressed dissatisfaction with counsel's position on the outstanding directive, the court in no way indicated that it intended to impose sanctions for non-compliance, let alone the drastic sanction of denying the petition. This was in contrast to the court's position concerning its first request for an affidavit of counsel. The court then stated that it would dismiss the petition if counsel failed to submit an affidavit within 60 days. Counsel met that deadline, and the court did not dismiss the petition, nor did it again threaten any sanctions.

CONCLUSION

For the reasons stated the court should reverse the orders of the district court and remand for proceedings before a different district judge with instructions to vacate the judgment of conviction and dismiss the indictment.

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From Hon. Robt. B. Fiske Jr.

By Olympia Mobilli